IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-344

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASCO, AFL-CIO,

Petitioners,

(ADDITIONAL PARTIES ARE NAMED ON NEXT PAGE)

# BRIEF OF RESPONDENT BOARD OF EDUCATION IN RESPONE TO PETITION FOR CERTIORARI

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BOSTON M. CHANCE, LOUIS MERCADO, et al., THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK: GERTRUDE E. UNSER, individually and in her capacity as Chairman of the Board of Examiners; JAY E. GREENE, MURRAY ROCKAWITZ and PAUL DENN, individually and in their capacities as members of the Board of Examiners; MURRAY BERGSTRAUM, individually and in his capacity as President of the Board of Education, et. al.,

Respondents.

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# BRIEF OF RESPONDENT BOARD OF EDUCATION IN RESPONSE TO PETITION FOR CERTIORARI

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## QUESTIONS PRESENTED

1. Does the decision of this Court in Washington v. Davis, ___ U.S. ___, 96, Ct. 2040 (1976), require a reversal of an award of constructive seniority where the District Court, in 1971, after reviewing lengthy affidavits and exhibits and taking oral testimony, found that the challenged examinations discriminated against blacks and Puerto Ricans and that such examinations were not job related, and, after the District Court's determination was upheld by the Court of Appeals, the Board of Education began hiring supervisory personnel pursuant to new examination procedures, which have continued up to the present time?

2. Did the Court of Appeals err, in providing for constructive seniority for those plaintiffs who took and failed the challenged

examinations and in permitting those members of plaintiffs' class, who have failed to apply for or take supervisory examinations because they reasonably believed such examinations to be discriminatory and unrelated to job performance, to be afforded constructive seniority if they can establish that they qualify for such by preponderance of the evidence.

FACTS

(1)

In 1971, plaintiffs Chance and others, who are blacks and Puerto Ricans, on behalf of themselves and those similiarly situated, brought suit against the New York City school system's Board of Examiners and the New York City Board of Education under federal civil rights laws 42 U.S.C. §§ 1981, 1983

(7a-8a).* Plaintiffs claimed that competitive examinations given by the Board of Examiners to those seeking permanent supervisory positions in the City's schools discriminated against blacks and Puerto Ricans and so violated the Equal Protection Clause of the Fourteenth Amendment (18a-19a).

On the application for a preliminary injunction, the Court held a hearing in which oral testimony was taken, and the Court had submitted to it lengthy affidavits with exhibits and extensive briefs of law and facts by all the parties (27a).

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*Numbers followed by "a" refer to pages in the Appellant's Appendix submitted on a prior appeal in this case, Docket # 2320 decided in 496 F. 2d 820. Numbers preceded by "A" refer to pages in the appendix attached to the Petition for Certiorari. Numbers not followed by any letter refer to the Joint Appendix submitted on the appeal in the Court of Appeals.

On July 14, 1971, the District Court, in an opinion, granted the preliminary injunction (23a et seq.; reported at 330 F. Supp. 203). The Court found that the challenged examinations did have a "de facto effect of discriminating significantly and substantially against qualified blacks and Puerto Rican applicants" (42a-43a). The Court then noted that, where the plaintiffs show that the examinations result in substantial discrimination, the Board of Examiners are then required to show that the examinations are job related (45a). The Court in its opinion then reviewed in detail the evidence" with respect to the validity, reliability and objectivity of the examinations" conducted by the Board of Examiners (46a). The Court concluded that the Board had not established that the exami-

nations were job related (62a).

The District Court wrote a second opinion on September 17, 1971, commenting on the forms of a proposed preliminary injunction which were submitted by the various parties (66a). The preliminary injunction, issued on September 17, 1971, enjoined the defendants from conducting further examinations, promulgating eligible lists or issuing licenses and making regular or permanent appointments (70a-71a). It ordered defendants to make all vacant supervisory positions available "on an acting basis" to candidates who satisfied eligibiity requirements established by state law and by the City Chancellor and the Board of Education (71a).

An appeal was taken to the Court of Appeals by the Board of Examiners, not by

the Board of Education or by the Chancellor (72a-73). The Board of Education had not actively opposed the motion for a preliminary injunction. The Court of Appeals upheld the preliminary injunction. 458 p. 2d 467 (1972).

During the proccedings on the application for a preliminary injunction, the Council of Supervisiors and Administrators (hereafter CSA) moved to intervene. The motion was denied. 51 F.R.D. 156. CSA filed an amicus brief on the appeal from the granting of the preliminary injunction.

Extensive settlement talks followed. On April 2, 1973, counsel for the plaintiffs and defendant Board of Examiners submitted to the Court a draft of a proposed stipulation of settlement (163a). The stipulation provided for an interim appointment procedure providing those appointed

with the status of permanent employees (98a-100a). The Board of Education objected to the stipulation (111a). The Chancellor approved the stipulation (117a-122a).

On May 21, 1973, the District Court approved the stipulation as to those defendants who had approved it (164a-171a). A further memorandum approving the stipulation was issued on July 10, 1973 (272a). On July 12, the Court modified the order granting a preliminary injunction and entered an order providing for the appointment of supervisory personnel on a permanent basis by the community school boards or the Board of Educaion (274a-280a). On that same date, the District Court entered a final judgment against the Board of Examiners and the Chancellor, both of who had joined with the plaintiffs in the stipulation (308a-316a).

The Board of Education appealed from the order modifying the preliminary injunction. On April 12, 1974, the Court of Appeals affirmed, 496 F. 2d 820.

CSA attempted to participate in the settlement discussions and the subsequent appeal but was denied intervenor status. See 496 F. 2d at p. 822, n. 4.

(2)

During the pendency of the second appeal to the Court of Appeals, the plaintiffs moved to have the District Court clarify (1) the orders entered on July 12, 1973, (2) the final judgment against the Board of Examiners and the Chancellor pursuant to their stipulation of settlement and (3) the preliminary injunction entered against all the remaining defendants.

This application sought to determine whether the orders governed not only the

initial appointment to supervisory positions of applicants who had never been appointed to fill vacancies in the school system but also the filling of vacancies by transfer and appointment of licensed personnel holding other regular positions.

On December 27, 1973, the District Court held that the provisions of the collective bargaining agreement relating to vacancies were inconsistent with the orders of July 12, 1973, and that the Board was prohibited from preferring licensed personnel over unlicensed personnel who were otherwise qualified for existing vacancies. CSA, who participated in this portion of the proceeding, appealed to the Court of Appeals (the Board of Education did not appeal). On May 15, 1974, the appeal was dismissed (Docket No. 74-1334)

In July 1974, the Board of Education indicated to the District Court that it was drafting a plan to revise existing rules and regulations concerning the exessing (reassignment or discharge of supervisory personnel when budgetary cutbacks or reorganization require the elimination of positions) of supervisory personnel in all of the schools of the City of New York (29-30). The Board of Education informed the District Court that it would seek the Court's approval of such rules consistent with the final judgment in the case (id.).

CSA was permitted to intervene in the proceeding (11, 27).

On July 24, 1974, the Board of Education sent the District Court a copy of the proposed excessing rules (35). The rules provided for excessing based on seniority.

On November 22, 1974, the District Court, accepting the plaintiffs' proposal, issued a final order on excessing. The order established a racial quota system for excessing. The order provided that each community school board which intended to excees would be reguired to excess supervisiors so that the racial percentage of supervisors in the school district before the excessing would be the same as the racial percentage of supervisors in the district after excessing (330).

On January 17, 1975, the Board of Education submitted a new proposed order (362-368). The order would permit a supervisor appointed after the injunction was granted on September 17, 1971 to be entitled to seniority for the purpose of excessing based "on the mean (midpoint)

date of appointment from the list of the examination", given prior to September 1, 1971, "he or she failed provided he or she was eligible for appointment when the list was promulgated" (365).

On February 7, 1975, the District Court rejected the proposed order and issued a final order on the excessing problem. The order provided for the racial quota system. At the time the District Court issued its final order, it filed an opinion (395-396). The Court stated that it recognized that facially neutral seniority systems had been upheld in Waters v. Wisconsin Steel Worker, Inc., 502 F. 2d 1309 (7th Cir., 1974), cert. den. 44 U.S.L.W. 3676 (Docket No. 74-1350, May 25, 1976) and Jersey Central Power Light Co. v. Electrical Workers Local 327, 508 F. 2d 687 (3rd Cir., 1975), judg.

vacated 44 U.S.L.W. 3669 (Docket No. 182, May 25, 1976). It concluded that the better view was expressed by the District Court in Watkins v. United Steelworkers Local 2369, 369 F. Supp. 122 (E.D. La., 1974) [subsequently reversed 516 F. 2d 41 (5th Cir., 1975)] which had held that company-wide seniority systems may be held to violate Title VII if found to perpetuate the effects of past discrimination.

(5)

The Court of Appeals (one judge dissenting) reversed the order of the District Court holding that a facially neutral excessing plan, which opeates on the concept of "last hired-first fired" does not discriminate against minorities who are disproportionately affected (A7a). The Court stated that it agreed with the

decisions of the Third Circuit in Jersey Central Power and Light Co. v. Local Union 327, I.B.E.W., 508 F. 2d 68) (3rd Cir., 1925), judg. vacated 44 U.S.L.W. 3669 (Docket #182, May 25, 1976) and Waters v. Wisconsin Steel Works Inc., 502 F. 2d 1309 (7th Cir., 1974), cert. den. 44 U.S.L.W. 3676 (Docket No. 74-1350, May 25, 1976) (A8a).

The Court noted that the Board of Education had indicated its willingness to accord constructive seniority to those minority supervisors who had failed a challenged examination (Alla). The Court of Appeals suggested that the District Court adopt the Board of Education's proposal (Alla).

The plaintiffs-appellees filed a timely petition for a rehearing and suggestion for rehearing en banc. While

the petition was under consideration, this Court decided Franks v. Bowman Transportation Co., ___ U.S. ___, 96 S. Ct. 1851 (1976). On May 16, 1976, the Court of Appeals, citing Franks and it own decision in Acha v. Beame 531 F. 2d 678 (2d Cir., 1976), decided after Chance, granted the petition for rehearing and modified its decree to accord constructive seniority to those members of the plaintiffs' class who could establish that they "have failed to apply for or take such examinations because they reasonably believed the supervisory examination to be discriminatory and unrelated to job performance" (A30a).

(6)

During the pendency of the appeal to the Court of Appeals of the excessing order of February 7, 1975, the District

Court, on March 25, 1975, entered a final order incorporating a permanent plan for hiring of supervisors. On April 9, 1976, the Board of Education moved to modify this order and plan. In a decision dated June 1, 1976, the Board of Education's motion was granted. The Board of Examiners opposed this motion and appealed the decision of the District Court to the Court of Appeals. This appeal is presently pending in the Court of Appeals. Docket No. 76-7348. CSA attempted to participate in these proceedings in the District Court but was denied intervenor status.

## POINT I

THE DECISION OF THIS COURT IN WASHINGTON V. DAVIS, ___ U.S. ____, 96 S. CT., 2040 (1976) DOES NOT REQUIRE A REVERSAL OF AN AWARD OF CONSTRUCTIVE SENIORITY WHERE, ON THE UNDERLYING ISSUE OF RACIAL DISCRIMINATION IN HIRING FOR PUBLIC EMPLOYMENT, THE DISTRICT COURT, IN 1971, AFTER REVIEWING LENGTHY AFFIDAVITS AND EXHIBITS AND TAKING ORAL TESTIMONY, FOUND THAT THE CHALLENGED EXAMINATIONS DISCRIMATED AGAINST BLACKS AND PUERTO RICANS AND THAT SUCH EXAMINATIONS WERE NOT JOB RELATED, AND AFTER THE DISTRICT COURT'S DETERMINATION WAS UPHELD BY THE COURT OF APPEALS, THE BOARD OF EDUCATION BEGAN HIRING SUPERVISORY PERSONNEL PURSUANT TO NEW-EXAMINATION PROCEDURES, WHICH PROCEDURES HAVE CONTINUE UP TO THE PRESENT TIME.

In Washington v. Davis, ___ U.S. ___, 96 S. Ct. 2040 (1976), unsuccessful black applicants for employment as police officers in the District of Columbia brought a civil rights action under 42 U.S.C. 1983 challenging the hiring and

examination procedures. The District Court, noting the absence of any claim of intentional discrimination, found that the examination had a discriminatory impact on blacks and that the test had not been validated to establish its reliability for measuring subsequent job performance. The District Court then stated that, while that showing sufficed to shift the burden of proof, the petitioners were not entitled to any relief because, among other things, the test was a useful indicator of training school performance. 96 S. Ct. at p. 2045.

The Court of Appeals reversed and directed summary judgment for the plaintiffs finding that the disproportionate impact on blacks resulting from the examination procedures established

a constitutional violation absent any proof by the City that the test adequately measured job performance.

This Court, in reversing the Court of Appeals and upholding the District Court's dismissal of the complaint, held that to prove a racial discrimination in violation of the Equal Protection Clause the plaintiffs must establish a racial discriminatory purpose. This Court noted that the constitutional issue in a 1983 action is different from an action brought under Title VII where the plaintiffs may establish a cause of action by showing the racially differential impact of the challenged hiring or promotion practices. 96 S. Ct. at p. 2047.

This Court then concluded that the District Court's determination in defendants favor should be upheld. The Court

noted that the District Court, after reviewing the evidence, had found that the challenged examination was job related and such determination was not erroneous. 965 Ct. at p. 2053.

Washington v. Davis is distinguishable from the instant case. As noted above, Washington involved only a constitutional challenge to hiring procedures prior to 1972. In the instant case, the order granting a preliminary injunction enjoining the defendants from conducting further examinations and making appointments to supervisory positions was issued in 1971. That order was affirmed by the Court of Appeals in 1972. The defendant Board of Examiners (the Board of Education and the Chancellor did appeal the order) did not petition this Court for review. After the unsuccessful appeal, the District Court approved new

procedures for the selection of supervisors in the New York City School System. These procedures are being used at the present time.

Title VII was made applicable to municipalities in 1972, during the pendency of this lawsuit. The plaintiffs here could have amended the complaint to add a Title VII cause of action. There was no reason to do so only because, in 1972, all the parties had agreed to comply with the new procedures for the selection of supervisors, which procedures were approved by the District Court.

In 1974, when the issue of excessing arose, no party to the proceeding including the CSA, challenged the finding of the District Court in 1971 on the underlying issue of discrimination. If the issue had been raised, the plaintiffs

could have amended their complaint to add a cause of action under Title VII. The evidence in the instant case of discriminatory impact would have established a cause of action under Title VII.

Washington v. Davis, a hiring case, cannot be construed to require, in a firing case, the dismissal of an action commenced five years earlier without giving the plaintiffs an opportunity to amend.

As we noted above, this Court in Washington refused to substitute its judgment for that of the District Court which had determined that the examination was job related. In this case, the District Court, after reviewing all the evidence, determined that, under any test of equal protection, the challenged examinations could not be justified (55a-56a, 62a). This finding was confirmed by the Court of Appeals, 458

F. 2d 1167, 1177 (2d Cir. 1972). These determinations are not clearly erroneous.

POINT II

THE BOARD OF EDUCATION, IN ITS PROPOSED ORDER OF JANUARY 17, 1975, PROVIDED FOR CONSTRUCTIVE SENIORITY TO THOSE PLAINTIFFS WHO TOOK AND FAILED THE CHALLENGED EXAMINATIONS. SINCE THE DECISION OF THE COURT OF APPEALS, UPON REHEARING, THE BOARD HAS BEGUN TO IMPLEMENT PROCEDURES TO AFFORD CONSTRUCTIVE SENIORITY TO THE OTHER PLAINTIFFS WHO QUALIFY. REVIEW BY THIS COURT AT THIS POINT IN THE PROCEEDING, FIVE YEARS AFTER THE PROCEEDING WAS COMMENCED, WOULD BE INAPPROPRIATE.

The decision of the Court of Appeals, upon rehearing, provided for constructive seniority to the plaintiffs in the Chance class, those who took and failed discriminatory supervisory examinations. In addition, the decision permitted the plaintiffs in the Mercado class, those who "have failed to apply for or take such supervisory

examinations because they reasonably believed the supervisory examinations to be discriminatory and unrelated to job performance, to establish in the district court that "they qualify as such" (30a).

The decision of the Court of Appeals comports with the policies of the Board of Education. During the hearings on the seniority issue, on January 17, 1975, the Board of Education submitted a proposed order providing for constructive seniority to the plaintiffs in the Chance class.

On August 25, 1976, on interim order was entered in the District Court providing that the members of both the Chance and the Mercado classes shall be given an opportunity to prove their entitlement to constructive seniority. On September 25, 1976, CSA filed a notice of appeal to the Court of Appeals from the District Court's

interim order.

The Board has begun to implement procedures to provide constructive seniority to those members of the Mercado class who qualify. A review by this Court at this point in the proceedings, five years after the commencement of the litigation, would be inappropriate.

## CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

October 7, 1976.

Respectfully submitted,

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